Supreme Court, U.S.
FILED
AUG 18 1993
OFFICE OF THE CLERK

No. 92-6281

In The

Supreme Court of the United States

October Term, 1993

ROBERT P. HAGEN,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of The State Of Utah

BRIEF FOR THE STATES OF SOUTH DAKOTA, ARIZONA, CALIFORNIA, MONTANA, NEVADA AND OKLAHOMA, AS AMICI CURIAE IN SUPPORT OF RESPONDENT STATE OF UTAH

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The State of South Dakota, and the other amici states, through their respective Attorneys General, respectfully submit a Brief Amicus Curiae pursuant to Supreme Court Rule 37.2 in support of the Respondent.

INTEREST OF THE AMICI STATES

The United States has created, within each of the amici states, reservations through treaty, statute or executive order. Many of these reservations have been, in the view of the amici states, diminished or disestablished by subsequent federal action.

The amici states have a vital interest in the proper determination of present reservation boundaries. In the absence of federal legislation similar to P.L. 83-280,[1] the states are generally prohibited from exercising criminal jurisdiction over tribal members within reservation

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[1] The question whether a reservation boundary has been diminished or disestablished will impact even P.L. 83-280 states. 18 U.S.C. § 1151(a) defines "Indian country" in part as:

> all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuances of any patent, and, including rights-of-way running through the reservation.

The limits of a reservation impact many areas of civil law as well, for example, taxation, (*see Oklahoma Tax Comm. v. Sac and Fox Nation*, 508 U.S. ___ (1993)); hunting and fishing, (*South Dakota v. Bourland*, 508 U.S. ___ (1993), and *Montana v. United States*, 450 U.S. 544 (1981)); zoning (*Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); and gaming, Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4)(A).

boundaries; similarly, the courts have frequently found that the states have no jurisdiction over non-Indians committing crimes against tribal members on reservations. *See, e.g., State v. Larson*, 455 N.W.2d 600 (S.D. 1990); *State v. Flint*, 756 P.2d 324 (Ariz. App. 1988), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 663 P.2d 1178 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531 (N.D. 1954). Federal law enforcement on reservations, especially with regard to nonfelonious activity, exists only at a low level as demonstrated by testimony repeatedly given through the last decade by the tribes and others.[2] Tribal law enforcement with regard to its own members, is frequently lax

[2] *See, e.g., Jurisdiction on Indian Reservations-Part 2: Hearing Before the Senate Select Committee on Indian Affairs*, 96th Cong., 2d Sess. at 24 (Aug. 11, 1980) (hereinafter *Jurisdiction-Part 2*): "The most common crimes, such as assaults or small burglaries, simply are not prosecuted in the vast majority of instances." (comment of Caleb Shields, Ft. Peck Tribal Executive Board); *Id.* at 56 (comment of Senator Melcher revealing complaints of state judges that federal authorities do not prosecute even major crimes); *Id.* at 32 (comment of local chief of police that only one of ten "felony-type" theft, burglary or assault cases are prosecuted on the reservation); *Id.* at 26 (United States Magistrate's comment on infrequency of prosecution of reservation assaults). Similar testimony was received approximately a decade later. *See, e.g., Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearings Before the Committee on Interior and Insular Affairs*, House of Representatives, 101st Cong., 1st Sess. at 187 (1989): "[O]nly the most aggregious [sic] and clear-cut cases can properly be pursued." (comment of Tribal Chairman Ketachezan); *Id.* at 281: "[W]e see an awful lot of people who probably should be prosecuted for different things just simply slip through because no one is quite sure who is in charge." (comment of Representative Campbell); *see also* H.R. Rep. No. 101-60, 101st Cong., 1st Sess. at 7 (1989).

and politicized. *See generally Duro v. Reina*, 495 U.S. 676, 693 (1990). No tribal law enforcement exists, of course, with regard to non-Indians. Improper resolution of reservation boundary issues unnecessarily restricts the appropriate reach of state law enforcement to the detriment of those Indians and non-Indians on the purported reservations and causes cases frequently to "fall through the cracks."[3]

Furthermore, while the states agree with Petitioner Tribe that tribal authority over non-Indians has been "severely" limited and can be exercised only in "rare situations," Brief of Petitioner at 30, n.14, the tribes nonetheless still retain the ability to and do subject non-Indians on reservations to lengthy legal battles to free themselves from unwanted (and unwarranted) tribal jurisdiction. *See, e.g., South Dakota v. Bourland*, 508 U.S. ___, 124 L.Ed.2d 606 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981).

[3] Legislators in both the 1980 and 1989 hearings drew attention to the fact that reservation law enforcement let cases "fall through the cracks." *See Jurisdiction-Part 2, supra* at 21 (comment of Senator Melcher); *Investigations and Prosecution of Federal Crimes on Indian Reservations: Oversight Hearings Before the Committee on Interior and Insular Affairs*, 100th Cong., 2d Sess. 249 (1988); *Prosecution of Federal Crimes, supra* at 249: "Case-by-case determination can lead to a cumbersome, inefficient process which ultimately leads to cases falling through the cracks." (Comment of Representative Tim Johnson.)

SUMMARY OF ARGUMENT

In *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), this Court set out a "fairly clean analytical structure" for determining when a surplus land act had disestablished a reservation boundary. The determination of whether a reservation boundary has been diminished is a matter of discerning congressional intent, and "[t]he most probative evidence of congressional intent is the statutory language." *Id.* Thus, the Court looks to the language of the congressional enactment to find "[e]xplicit reference to cession or *other language* evidencing the present and total surrender of all tribal interests. . . . " *Id.* (Emphasis added.) As *Solem* itself indicates, through reference to *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962), as cited at *Solem*, 465 U.S. at 470, language of an act which affirmatively returns land to the "public domain" is such "other language," which evidences a "total surrender of all tribal interests" and thus operates to disestablish the reservation. "Cession" language may also be important and when such "cession" language is "buttressed by an unconditional commitment from Congress to compensate the Indian Tribe for its opened land, there is an almost insurmountable presumption that Congress meant" that the Tribe's reservation was thus diminished. *Solem*, 465 U.S. at 470-471.

Even absent language that diminishes the reservation by returning the subject land to the "public domain," and even in the absence of "cession" language combined with an unconditional commitment to compensate the Tribe, the Court will look to the contemporaneous understanding of the act. *Solem*, 465 U.S. at 471. Finally, the Court will look to the actual settlement of the reservation to

determine what Congress "expected would happen once" the land was opened to non-Indians. 465 U.S. at 472. The Court also has indicated that "de facto, if not de jure" diminishment may occur absent any other factor when an area "has long since lost its Indian character." 465 U.S. at 471.

Petitioner and his supporting amici analysis badly slight several of the critical components of this Court's tests. First, United States and Tribe ignore almost entirely this Court's consistent finding, set out in detail below, that when Congress affirmatively, in "operative language," restores particular land to the "public domain," the reservation is pro tanto diminished. Second, Petitioner implies the almost absolute necessity of "language of cession" in an agreement with a Tribe combined with an unconditional commitment from Congress to compensate the Tribe for its open land so as to constitute disestablishment. What Petitioner thus ignores is that a "cession" of lands by a Tribe is merely one way that allows them to be returned "to the public domain"; in other words, the "cession" is merely a means to transfer the lands to the public domain. Consistent with decisions of this Court since 1914, when lands are restored to the public domain either directly by an explicit restoration "to the public domain," or indirectly through "cession" language, the reservation is diminished. Petitioner confuses *method* with *result*.

Further, we suggest that Petitioner and the Tenth Circuit Court of Appeals in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985)(en banc), *cert. denied*, 479 U.S. 994 (1986) badly misread the contemporaneous understanding of the transactions between the Tribe and United

States, and, moreover, have ignored the demographics of the area contrary to *Solem v. Bartlett*, 465 U.S. at 471-472 and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977).

In the case now before the Court, the critical act provides that after certain allotments are made "the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, 32 Stat. 245, 263-264 (1902). Congress, in the "operative language," restored the subject lands to the public domain, and thus, in line with the well-established precedent disestablished the reservation boundaries. Furthermore, the demographics of the former reservation indicate a long-standing overwhelming majority of non-Indians, and provide both additional evidence of congressional intent to disestablish and of de facto disestablishment.

ARGUMENT

I

CONGRESS INEVITABLY INTENDED DIMINISHMENT OF A RESERVATION WHEN IT AFFIRMATIVELY RESTORED LAND TO THE "PUBLIC DOMAIN."

This Court has stated that:

> The most probative evidence of congressional intent is the statutory language used to open the Indian lands.

Solem v. Bartlett, 465 U.S. 463, 470 (1984).

The rule giving primacy to the text of a congressional statute is, of course, unassailable and is one which promotes the rule of law. A search of the statutory language which has, in the past, been used "to open the Indian lands" indicates invariably that when Congress has explicitly, in the "operative language" of a statute, "restored lands to the public domain" it has been found to have divested reservation status from the lands.

This Court's adoption of this principle dates at least to 1914, at a time period roughly contemporaneous with the Surplus Lands Acts themselves. In *United States v. Pelican*, 232 U.S. 442 (1914), the Court considered the Act of July 1, 1892, which specified that a portion of a reservation was "vacated and restored to the public domain." This Act, said the Court, was "legislation by which the reservation was diminished." 232 U.S. at 445. The 1914 finding of the Court with regard to language which restored areas "to the public domain" is especially valuable, given its proximity in time with the legislation itself. *Pelican* is itself consistent with an even earlier circuit court decision, *McFadden v. Mountain View Min. & Mill. Co.*, 97 F.R. 670 (9th Cir. 1899).

The second opportunity for this Court to examine this question came in *Sioux Tribe v. United States*, 316 U.S. 317 (1942). In *Sioux Tribe*, the Court considered various executive orders which indicated that particular land was "'restored to the public domain.'" 316 U.S. at 323. In each of these cases, restoration to the public domain was equated with the termination of any special status.

In *Seymour v. Superintendent*, 368 U.S. 351, 354 (1962), the Court reaffirmed the concept that a reservation was

diminished when the lands were "vacated and restored to the public domain. . . . " The Court stated that:

> In 1892, the size of this reservation was diminished when Congress passed an Act that, subject to reservations and allotments made to individual Colville Indians, about one-half of the original Colville reservation, since commonly referred to as the 'North Half,' should be 'vacated and restored to the public domain. . . . ' (Footnote omitted.)

Unlike legislation relating to the North Half, the later legislation relating to the South Half contained no "restore to the public domain" language and the Court thus refused to find disestablishment of the South Half.

Mattz v. Arnett, 412 U.S. 481 (1973) traced the progress of certain surplus land legislation which had *originally* provided that the lands "be restored to the public domain." 412 U.S. at 502. The bill containing that language, however, was defeated in the Senate, *see* 412 U.S. at 502, and legislation ultimately passed *without* such language. The Court was to hold that no disestablishment was effected.[4]

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court considered the disestablishment of the Sisseton Reservation in South Dakota. Although the statute at issue did not explicitly restore the lands "to the

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[4] The Mattz Court did, however, refer to language which affirmatively "vacated and restored to the public domain" the Colville lands as "clear language of express termination. . . . " *Mattz*, 412 U.S. at 504, n.22.

public domain," the effect of the Act was to accomplish just that. As the Court said:

> This language [i.e., the Sisseton Agreement language] is virtually indistinguishable from that used in the other sum-certain, cession agreements ratified by Congress in the same 1891 Act. See nn.21 and 22, supra. *That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much.* The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the "public domain."

DeCoteau, 420 U.S. at 446. The critical point in *DeCoteau* is that the *effect* of the Act was to "restore lands to the public domain" and that this "restoration to the public domain" constituted the disestablishment of the reservation.

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), this Court considered again congressional language restoring land "to the public domain." The Court drew attention to the creation of the Great Sioux Reservation which constituted twenty-five million acres. *Rosebud*, 430 U.S. 589. The Court found that in 1877, the Black Hills portion of the reservation was removed from the reservation. In 1889, according to the court:

> approximately one-half of the remaining reservation was 'restored to the public domain' under the Act of March 2, 1889, 25 Stat. 896, § 21, while six separate Reservations were carved out of the remainder. (Footnote omitted.) §§ 1-6.

Rosebud, 420 U.S. at 519.

The Court thus equated the affirmative restoration to the "public domain" of the remaining one-half of the Great Sioux Reservation with disestablishment of that portion of the reservation.

Although the diminishments of Mellette, Tripp and Gregory Counties at issue in *Rosebud* did not contain the "public domain" language, other indicia of disestablishment allowed the six-member majority to find disestablishment. Three Justices dissented but nonetheless positively endorsed the principle that restoration to the "public domain" language was "clear language of express termination." 430 U.S. at 618 (Marshall, J., dissenting). The dissenters likewise added their specific agreement that when Congress "expressly 'restored to the public domain' " part of the Great Sioux Reservation, that part of the Reservation was disestablished. *Id.*

Solem v. Bartlett, supra, again affirms the concept that return of land to the public domain constitutes disestablishment of reservation boundaries. In *Solem*, 465 U.S. at 470, the Court began by explicitly noting that:

> The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or *other language evidencing the present and total surrender of all tribal interests strongly suggest that Congress meant to divest from the reservation all unallotted opened lands. DeCoteau, the District County Court, supra* at 444-445; *Seymour v. Superintendent, supra* at 355. (Emphasis added.)

The cases cited in this passage are *DeCoteau* and *Seymour v. Superintendent*. In *DeCoteau*, the language cited was "cession" language coupled with an unconditional

commitment to compensate. *Seymour v. Superintendent*, as cited by *Solem*, contrasts language which "vacated and restored [certain lands] to the public domain" and thus diminished the reservation, *Seymour*, 368 U.S. at 355, with language of a second act which, among other things, did *not* "return land to the public domain," *id.*, and did not diminish the reservation. The citation of this particular passage in *Seymour* by the *Solem* Court indicates the *Solem* Court's adherence to the long line of cases indicating that restoration to the public domain does, in fact, constitute termination of reservation status for the lands involved. It also indicates, not surprisingly, the adherence of Justice Marshall, the author of *Solem v. Bartlett*, with his earlier dissent, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 618, that restoration to the "public domain" language was "clear language of express termination." The argument has been made that *Solem* altered this long-standing rule regarding disestablishment by virtue of return of land to the public domain. In *Solem*, however, Congress did *not* affirmatively restore lands to the public domain. Instead, Congress merely provided that the secretary should "sell and dispose" of certain lands. 465 U.S. at 473. There is no affirmative restoration of lands to the public domain by Congress in the *Solem* Act. It is, of course, true that one section of the Act referred to certain areas of the reservation as being in "the public domain." *See Solem*, 465 U.S. at 475. The Court in *Solem*, 465 U.S. at 472, 474, however, directs its focus to the "operative language" of the Act, or the language through which Congress affirmatively acted. There is nowhere within the "operative language" of the Cheyenne River Act an affirmative restoration of Indian lands to the "public domain." The lack of

"operative language" restoring the lands to "the pubic domain" distinguishes *Solem* from the earlier cases.[5]

Thus, this Court has consistently held that when a statute in its "operative language" restores lands to the public domain, those lands are disestablished or removed from the reservation. That is precisely the case here. The Act of May 27, 1902, 32 Stat. 245, 263-264, provides that after allotments are made "the unallotted lands within said reservation *shall be restored to the public domain*. . . . " In line with the cases from *Pelican* to *Solem*, this affirmative restoration of lands to the public domain amounts to a congressional determination that the reservation is disestablished.

II

CONTEMPORANEOUS CIRCUMSTANCES DEMONSTRATE A CLEAR TRIBAL AND CONGRESSIONAL UNDERSTANDING THAT THE ACT WOULD CONSTITUTE DISESTABLISHMENT.

The State of Utah has ably demonstrated that contemporaneous circumstances indicate a clear tribal and

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[5] The *Solem* Court also stated that "even without diminishment, unallotted opened lands could be conceived of as being in 'the public domain' inasmuch as they were available through settlement." 465 U.S. at 475 n.17. The Court does not, however, undermine its earlier holdings that language affirmatively restoring lands to the public domain disestablishes the reservation, but refers here only to one potential concept of the nature of "public domain." A contrary conclusion, i.e., one which eviscerates the significance of "public domain" language when used to describe affirmative action by Congress, would reduce the several cases cited above to irrelevancy, a result the Court did not, presumably, intend.

congressional understanding that the legislation in issue would disestablish the reservation. The most critical part of the negotiations was Commissioner McLaughlin's talk with tribal members which explained, in as clear terms as possible, that the boundary to the reservation was being eliminated whether the tribal members desired such elimination or not. McLaughlin stated in his negotiations with the Tribe:

> You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will *pull up the nails* which hold down that line and *after next year there will be no outside boundary line to this* reservation. . . . The question of opening the reservation is not with you; that has been determined by the act of congress. . . .

JX 162, pp. 42-45 (emphasis added). *See State v. Perank: Is the Unitah-Ouray Reservation "Nailed Down Upon the Border"*, 1992 B.Y.U.L. Rev. 1247 (1992). The United States now attempts to repudiate the statement of its negotiator with the Tribes. *See Brief for the United States as Amicus Curiae Supporting Petitioner* at 23 and n.31. Although McLaughlin clearly informed the tribal members that the reason that Congress could take such action was a recent Supreme Court decision, the tribal members are presumed not to know or believe this statement apparently because the decision was "only four months" old. *Id.* In fact, matters proceeded precisely as McLaughlin told the Tribes they would proceed: Congress "pulled up the nails" of the reservation and provided that there would

be "no outside boundary line"; it also imposed a mandatory allotment scheme. JX 162, pp. 42-45. (A more extensive excerpt from this dialogue is set forth as Appendix "C" to Utah's Brief.) The federal position that a true statement to the Tribe by a federal negotiator should be ignored is anomalous, to say the least.[6]

III

THE JUSTIFIABLE EXPECTATIONS OF THE PARTIES ARE THAT THE RESERVATION BOUNDARIES HAVE BEEN DIMINISHED.

Rosebud, 430 U.S. at 604-605 and *Solem*, 465 U.S. at 471-472, grant substantial deference to the justifiable expectations of the parties with regard to the existence or nonexistence of reservation boundaries. Close consideration of the cases indicates that such deference is expressed in two ways. First, according to *Solem*, 465 U.S. at 471-472, a court will:

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[6] It is striking that neither the United States nor the tribe now contests the removal of the Gilsonite Strip from this very reservation by the Act of May 24, 1888, 25 Stat. 157. This statute provided that the lands were to be "restored to the public domain," after a favorable tribal vote. Moreover, the accompanying House Report, H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888), reinforces the view that Congress intended to terminate reservation status when it returned reservation lands to the public domain, stating: "[T]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof *to the public domain* as the exigencies of advancing population required it. . . . " (Emphasis added.) *See Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1108 (10th Cir. 1985)(Seth, J., dissenting)(*cert. denied*) 479 U.S. 994 (1986).

> look to the subsequent demographic history of the opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers. (Footnote omitted.)

Second, and more dramatically, the influx of non-Indians into an area may well signal acquiescence of the parties in diminishment and, consistent with the law of state boundary disputes, de facto diminishment might be found. *Solem*, 465 U.S. at 471. *See also Louisiana v. Mississippi*, 202 U.S. 1, 53-54 (1906)("[T]his court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive. . . . "); *Rhode Island v. Massachusetts*, 45 U.S. 591, 639 (1846) ("for the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary").

In the case now before the Court, the demographic information constitutes strong and compelling evidence of congressional intent to disestablish and, in addition, is of such a quality as to support a finding of de jure or de facto disestablishment.

The most important demographic fact is that the area is overwhelmingly populated by non-Indians. At least 18,000 non-Indians live within the historic reservation boundaries. (J.A. 130-131) (Seth, J., dissenting). Only 1,500 enrolled members of the Tribe live within the former boundaries. Pet. App. 38A.; *Bureau of Econ. and Bus.*

Research Report, University of Utah, Vol. 45, No. 1, p. 8, Table 5, July 1, 1984 (1985).

Further, of those 1,500 members, only about 300 live on the actual nontrust lands at issue before this Court. J.A. 131. Thus, using the figures most generously to the Tribe, approximately 92% of the persons within the historic boundaries are non-Indian. Utilizing the number of Native Americans who reside upon the land actually at issue in this case, the statistics become even more overwhelming. Of the approximately 18,000 persons who live on the nontrust areas, over 98% are non-Indian; only about 300 Native Americans live in the nontrust areas, as noted above.

Similarly, patterns within the historic reservation boundaries at issue parallel population configurations. Virtually all the land in question consists of private, state, Bureau of Land Management or federal Forest Service property. *See* Map, J.A. 185.

In short, relying upon the restoration of the now disputed lands to the public domain, thousands of non-Indians entered the area and now overwhelmingly populate and own the area. Their justifiable expectations are to live pursuant to the rules and regulations of a government in which they can participate, and to have access to a responsive law and order system which is able to deal with offenses of all persons within the community. They also necessarily expected to be free from the incessant disputes which face non-Indians with regard to civil regulatory issues.

CONCLUSION

The most important single factor in determining whether reservation boundaries have been diminished is the language of the statute. In the case now before this Court, Congress affirmatively, in the "operative language" of the statute, restored the land in question "to the public domain." Such affirmative restoration of lands to the public domain, without exception, has been held to constitute disestablishment of reservation boundaries. This interpretation is further supported by the contemporaneous understanding of the statute and in particular by the clear and unequivocal statement of the negotiator for the United States to the Tribe. Finally, the overwhelming number of non-Indians who have entered the area subsequent to the restoration of the land to the public domain indicate a settled expectation which should not, under this Court's precedents, be now disturbed.

The decision of the Utah Supreme Court should be affirmed.

Respectfully submitted,

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